Mee Ying Enterprise Jewellers (suing as a firm) v Che Jah bte Abdullah

HIGH COURT (KOTA BHARU) — CIVIL SUIT NO 23-69-88
IDRIS YUSOFF J
17 AUGUST 1991

Civil Procedure *— Jurisdiction — Contract — Breach of contract — Unconditional appearance — Appellant resident in Malaysian state — Effect of entry of unconditional appearance — Whether Malaysian court has jurisdiction — Courts of Judicature Act 1964 s 23(1)*

The plaintiffs (respondents) claim against the defendant (appellant) an alleged debt due on a breach of contract arising out of a series of commercial transactions between the two parties. Although a writ was served on the appellant, no appearance was entered and a judgment in default was entered for the respondents. However, on the application of the appellant and with the consent of the respondents, the said judgment was set aside. Subsequently, the appellant entered an unconditional appearance. The respondents then applied for summary judgment which was opposed by the appellant. The application was heard by the senior assistant registrar who reserved his decision. Before the decision was delivered, the appellant filed an application for stay of proceedings and/or delivery of decision as scheduled alleging for the first time that as the entire dealings relating to the alleged breach of contract occurred in Singapore, the Malaysian court had no jurisdiction to deal with such matter. The appellant's application was later heard and dismissed by the senior assistant registrar. The appellant appealed.

Held, dismissing the appeal:

(1) A writ may be set aside for an alleged lack of jurisdiction by an entry of a conditional appearance followed by an application by summons to set it aside. By entering an unconditional appearance the appellant had waived any objection she might have had on the question of jurisdiction and she had submitted to the jurisdiction of the court.

(2) Paragraphs (a) to (d) to s 23(1) of the Courts of Judicature Act 1964 which governed the civil jurisdiction of the Malaysian court must be read disjunctively. It was not disputed that at all material times the appellant was resident in Kelantan, which met the requirement laid down in s 23(1)(b) of the Act. In addition, the appellant had, by her letter, admitted liability and had even made an initial payment of $5,000 pursuant thereto. The court, therefore, had jurisdiction to determine the claim.

[Bahasa Malaysia summary

Plaintif (penentang) menuntut terhadap defendan (perayu) hutang yang dikatakan kena dibayar kerana kemungkiran kontrak yang timbul daripada transaksi perdagangan yang berturut-turut antara kedua-dua pihak itu. Walaupun suatu writ telah disampaikan kepada perayu, tiada kehadiran dimasukkan dan satu penghakiman ingkar telah dicatatkan menyebelahi penentang. Akan tetapi, atas permohonan perayu dan dengan keizinan penentang, penghakiman itu telah diketepikan. Kemudiannya, perayu telah memasukkan suatu kehadiran tanpa syarat. Penentang pada masa itu memohon penghakiman terus dan perayu menentangnya. Permohonan itu telah didengar oleh penolong kanan pendaftar yang telah menangguhkan keputusannya. Sebelum keputusan itu disampaikan, perayu telah memfailkan suatu permohonan bagi penggantungan prosiding dan/atau penyampaian keputusan mengikut jadual mengatakan buat pertama kalinya bahawa oleh kerana seluruh urusan berkenaan dengan kemungkiran kontrak yang dikatakan itu terjadi di Singapura, mahkamah Malaysia tidak mempunyai bidang kuasa untuk membicarakan perkara itu. Permohonan perayu telah didengar kemudian dan ditolak oleh penolong kanan pendaftar. Perayu telah merayu.

Diputuskan, menolak rayuan itu:

(1) Suatu writ boleh diketepikan kerana kekurangan bidang kuasa dengan memasukkan kehadiran bersyarat diikuti dengan suatu permohonan melalui saman untuk mengetepikannya. Dengan memasukkan suatu kehadiran tanpa syarat perayu telah mengetepikan sebarang bantahan yang beliau mungkin ada atas soal bidang kuasa dan beliau telah menyerah kepada bidang kuasa mahkamah.

(2) Perenggan (a) hingga (d) kepada s 23(1) Akta Mahkamah Kehakiman 1964 yang menentukan bidang kuasa sivil mahkamah Malaysia mesti dibaca secara disjunktif. Telah tidak dipertikaikan bahawa pada semua masa yang penting perayu bermastautin di Kelantan, yang memenuhi kehendak s 23(1)(b) Akta itu. Tambahan pula, perayu telah, melalui suratnya, mengakui liabiliti dan telah juga membuat pembayaran permulaan berjumlah $5,000 mengikutnya. Mahkamah oleh itu mempunyai bidang kuasa untuk memutuskan tuntutan itu.]

[*Editorial Note*: The appellant's appeal to the Supreme Court vide Civil Appeal No 03–72–91 was dismissed by the court comprising Harun Hashim, Mohamed Azmi and Edgar Joseph Jr SCJJ.]

Notes

For cases on the jurisdiction of court to determine claims on contract, see 2 *Mallal's Digest* (4th Ed) paras 1407–1408.

Cases referred to

1 *Government of Singapore v Koh Eng Kiat* [1967] 1 MLJ 157 (refd)
2 *Syarikat Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn Bhd* [1975] 2 MLJ 115 (refd)
3 *Lam Kok Trading Co (Pte) Ltd & Anor v Yorkshire Switchgear and Engineering Co Ltd* [1976] 1 MLJ 239 (folld)
4 *Keymer & Reddy* [1912] 1 KB 215 (folld)
5 *Malayan Banking Bhd v International Tin Council and another appeal* [1989] 3 MLJ 286 (folld)
6 *ELF Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 (refd)
7 *The Fehmarn* [1957] 2 All ER 707; [1957] 1 WLR 815; [1957] 1 Lloyd's Rep 511 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 23(1)

C Jegathesan (*C Jegathesan*) for the appellant.
Foo Say Ghee (*Foo Say Ghee & Zamzuri*) for the respondents.

Idris Yusoff J: The respondents' (plaintiffs) claim against the appellant (defendant) was founded on a breach of contract arising out of a series of commercial transactions between the two parties. The sum claimed was $204,275 being the balance due for jewellery sold and delivered by the respondents to the appellant at the latter's request, together with interest at the rate of 8%pa from 17 December 1987 to the date of realization.

To recover the alleged debt the respondents served a writ of summons dated 27 April 1988 on the appellant. As no appearance was entered, judgment in default was accordingly entered for the respondents as prayed. However, on the application of the appellant the said judgment was set aside by consent of the respondents.

On 30 August 1988, the writ was properly served on the appellant whereupon unconditional appearance was entered on behalf of the appellant by Messrs C Jegathesan on 3 September 1988. On 29 September 1988, the respondents filed an application for summary judgment under O 14 of the Rules of the High Court 1980, the said application being supported by the affidavit of one Mr Loh Kim Mee affirmed on 15 September 1988. On 3 October 1988, the appellant filed her defence and a week later, ie on 10 October 1988, filed an affidavit resisting the respondents' application for summary judgment. The O 14 application was heard by the senior assistant registrar on 27 November 1988 but was postponed to 4 December 1988 for decision.

In the meantime, on 30 November 1988, the appellant filed an application by way of summons-in-chambers for stay of proceedings and/or delivery of decision scheduled for 4 December 1988. In this application the appellant for the first time raised the question of jurisdiction. She alleged that as the entire dealings occurred in the Republic of Singapore, a foreign

country, the court in Peninsular Malaysia had no jurisdiction to deal with such matter. Be it noted that although the summons was filed on 30 November 1988 it was only issued out of the court's registry on 12 December 1988, by then the senior assistant registrar had delivered his decision on the O 14 application as scheduled in which he granted the appellant conditional leave to defend the claim, the condition being that the full sum was required to be deposited by the appellant into court within 21 days from the date of the order and upon default the respondents would be at liberty to enter final judgment. Against the said order the appellant filed a notice of appeal on 5 December 1988 to the judge-in-chambers. However, a final judgment was entered for the respondents on 16 January 1989 for the sum of $204,275 on the failure of the appellant to deposit the said sum into court.

Following the application for stay of proceedings, the appellant on 17 December 1988 also filed an application to amend her defence. However, by reason of the fact that the decision on the O 14 application had been made, the applications for stay and also for amendment had not been heard by the senior assistant registrar. When on 26 February 1990 the appellant's appeal came before me, I directed the senior assistant registrar to deal also with the question of jurisdiction.

The respondents subsequently filed an affidavit in response to the appellant's affidavit of 29 November 1988. On 18 April 1990, the senior assistant registrar dealt with the question of jurisdiction, whereupon he held that the court in Peninsular Malaysia had jurisdiction to determine the claim.

Being dissatisfied with the said decision the appellant appealed to me and after hearing submissions from both counsel I dismissed the appellant's appeal with costs. Hence her appeal to the Supreme Court.

Mr C Jegathesan for the appellant in his submission contended that the contract of sale was concluded in Singapore contrary to what was claimed by the respondents. His argument was that although in the invoices prepared by the respondents, the prices quoted therein were in Malaysian ringgit, this in itself was insufficient to bring the respondents' claim to the Malaysian court as it was common practice, for instance, in most of the dealings in Thailand involving Malaysians, for payments to be made in Malaysian currency. It was clear, as argued by counsel, from the fact that all purchases and deliveries of the goods were done in Singapore that the claim could only be pursued in a Singapore court.

In regard to the letter of 15 November 1987 which contained an admission by the appellant that she owed the respondents the sum claimed, counsel maintained that it was not done of her own volition; it was 'extracted' from the appellant by the respondents' solicitors and, in the event, it could not be said that the appellant had agreed to submit to the jurisdiction of the Malaysian court. Mr C Jegathesan also referred to s 3 of the Courts of Judicature Act 1964 for the definition of 'local jurisdiction' which sets out:

(a) in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Trengganu; and

(b) in the case of the High Court in Borneo, the territory comprised in the Borneo States, namely, Sabah and Sarawak,

including, in either case, the territorial waters and the air space above those States and the territorial waters;

In the context of the above definition it was clear, according to counsel, that if the court were to hold that the sale could not be deemed to have taken place in Malaysia then the claim could not come within the jurisdiction of the Malaysian court notwithstanding that at the initial stage the appellant accepted service of the writ of summons and statement of claim.

It was further submitted that what ought to have been done in this case, following the case of *Government of Singapore v Koh Eng Kiat*,[1] would be for the respondents to file the suit in Singapore and upon obtaining leave for service out of jurisdiction, should have had it served on the appellant. And again relying on the case of *Syarikat Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn Bhd*,[2] counsel maintained that the present suit could only be brought in a Singapore court as there did not seem to be any evidence to suggest that either the respondents or any of their branches carried on business in Malaysia; likewise no such evidence showed that the appellant had carried on business in Singapore or that she had been resident there.

Mr Foo Say Ghee for the respondents, quite apart from asserting that the contract was concluded in Malaysia as the facts would show, maintained that in the circumstances the claim could be filed in a Malaysian court having regard to what had initially taken place, not to mention that the statute had conferred such jurisdiction on the High Court. His argument substantially centred on (i) the entry of unconditional appearance on 3 September 1988 by the appellant and (ii) the jurisdiction of the Malaysian court as conferred by s 23(1) of the Courts of Judicature Act 1964.

(i) *Entry of unconditional appearance*

One way of setting aside the writ for an alleged lack of jurisdiction was by the entry of a conditional appearance followed by an application by summons to set it aside.

As stated earlier the appellant had on 3 September 1988 entered an unconditional appearance to the writ. It was argued by counsel for the respondents that such an appearance had the effect of waiving any objection she might have had on the question of jurisdiction, and in the final analysis it could be said that she had submitted to the jurisdiction of this court. Counsel also referred to the commentary in *Mallal's Supreme Court Practice* (2nd Ed) p 68 para 12/1/4 which clearly stated that the effect of unconditional appearance 'is a waiver of any irregularity there may be and a submission to the jurisdiction of the court ...' but not in the case of a nullity as where the court had no jurisdiction at all to adjudicate on the matter. However, it was contended in this case that the Malaysian court had such jurisdiction.

Abdul Hamid J (as he then was) in *Lam Kok Trading Co (Pte) Ltd & Anor v Yorkshire Switchgear and Engineering Co Ltd*[3] allowed an application

to set aside the writ of summons and of subsequent proceedings on the ground that the court in Malaysia had no jurisdiction to deal with the matter; so had the two cases cited by counsel for the appellant, namely, *Government of Singapore v Koh Eng Kiat*[1] and *Syarikat Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn Bhd*[2] where the court set aside services of the writs on the defendants following their entries of conditional appearances and subsequent applications for setting aside the writs.

An English case of *Keymer v Reddy*[4] was also pertinent. In that case the Court of Appeal made clear the effect of a conditional appearance. The headnote reads:

> *A defendant who objects to the jurisdiction has an absolute right to appear under protest.* The practice of the Master in dealing with an appearance under protest of allowing the defendant a reasonable time for applying to set aside the writ and then sealing the appearance with an entry that the appearance is to stand as *unconditional unless* the defendant makes the application within the prescribed time has no statutory authority and cannot limit the power of the court to enlarge the time for objecting to the jurisdiction. The meaning of the practice, which is necessary to prevent the hands of the court from being tied up indefinitely by a formal protest, is merely *that the omission of the defendant to apply to set aside the writ within the prescribed time raises a presumption against him of waiver of the objection to the jurisdiction* and entitles the officials of the court in the ordinary course to treat the appearance as absolute. (Emphasis supplied.)

In view of the foregoing I agreed with the respondents' counsel on the effect of the entry of an unconditional appearance by the appellant.

(ii) *Jurisdiction of Malaysian court as conferred by s 23(1) of the Courts of Judicature Act 1964*

Counsel for the respondents also drew the court's attention to s 23(1) of the Courts of Judicature Act 1964 which governs the civil jurisdiction of Malaysian court. The said section reads:

> Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
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> (a) the cause of action arose, or
> (b) the defendant or one of several defendants resides or has his place of business, or
> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the Court ...

Counsel submitted that paras (a) to (d) must be read disjunctively. In support thereof he referred to *Lam Kok Trading*[3] which clearly showed that for the court to assume jurisdiction, either one of paras (a) to (d) must apply. Reliance was also placed on *Malayan Banking Bhd v International Tin Council and another appeal*[5] where the Supreme Court held:

A (1) ... s 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court in cases where foreigners overseas are sued as co-defendants with local residents.

(2) ... and in construing an Act of Parliament where the words used by the legislature are precise and unambiguous, then the literal and strict construction rules should apply. There can be no doubt that Parliament intends to B confer on the High Courts extra-territorial jurisdiction in cases where more than one defendant are being sued, so long as one of the several defendants resides or has his place of business within Malaysia.

These two cases clearly showed that the paragraphs needed to be read disjunctively.

C It was not disputed that at all material times the appellant was resident in Kelantan, which met the requirement laid down in s 23(1)(b) of the Act (see again *Malayan Banking Bhd v International Tin Council and another appeal*[5]).

Counsel also referred to *ELF Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd*[6] where the High Court held, relying on the English case of D *The Fehmarn*,[7] that even though the parties had agreed that Singapore law could govern any dispute, that did not oust the jurisdiction of the Malaysian court to try an action arising out of the agreement.

As could be gathered from the respective affidavits filed by both parties the facts as highlighted by the respondents' counsel, for which I saw no E reason to disagree, showed:

(1) Many of the transactions were made pursuant to telephonic communications between the parties.
(2) All the bills or invoices were made out in Malaysian currency.
(3) All payments were made in Malaysian currency.
F (4) The defendant had by her letter dated 15 November 1987 addressed to the plaintiffs' solicitors admitted liability for the sum of $209,275 and pursuant thereto had paid the plaintiffs the sum of $5,000.
(5) The defendant acted in breach of her agreement dated 15 November 1987 in failing to honour her undertaking to pay the plaintiffs.

G I would pause here to elaborate on the facts as highlighted in (4) above. As stated earlier, the appellant's counsel alleged that the letter dated 15 November 1987 was not made of the appellant's own volition. However, having gone through the affidavits, I was not satisfied that there was evidence or sufficient evidence to support any allegation of impropriety H though I accepted that the said letter was prepared by a staff of the respondents' solicitor's firm. Be that as it may I did not think there was any wrong for the letter to be prepared by such staff in the absence of any evidence of coercion or inducement. In fact I would add that if at all there was any truth in the allegation I would not expect the appellant to effect the initial payment of $5,000.

I It was therefore clear to me from the facts as highlighted above that both parties never intended to abdicate the jurisdiction of the Malaysian court.

The facts and authorities as discussed above provided strong support for holding that the Malaysian court had jurisdiction to determine the claim. I also held that the respondents had a prima facie right to choose where to file the suit; the choice should not be interfered with except perhaps on clear ground of injustice or inconvenience which I failed to see any.

For the reasons above stated I held that the appellant's objection on jurisdiction failed and I therefore dismissed the appeal with costs.

Appeal dismissed.

Reported by Mathavan Devadas